IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.182 OF 1993

1. Smt. Madhumati Suresh Raut,
Aged about 30 years,
Occ: Agriculture/Household,
r/o Shrigonda, Taluka
Shrigonda, Dist: Ahmednagar.

2. Muktabai Raghunath Raut,
Aged about 42 years,
Occ: Household, r/o Nirmal,
Taluka Vasai, Dist: Thane. .... Petitioners

\- Versus -

1. Namdeo Tukaram Yadav,
since deceased, through his
legal heirs and represen-
tatives:

1A. Ramchandra Namdeo Yadav,
Aged about 38 years,
Occ: Barber.

1B. Madhukar Namdeo Yadav,
Aged about 35 years,
Occ: Agriculturist.

1C. Dnyandeo Namdeo Yadav,
Aged about 33 years,
Occ: Agriculture.

1D. Vasant Namdeo Yadav,
Aged about 36 years,
Occ: Agriculture.

1E. Dismissed vide Court's order dated 29-7-02

1F. Janabai Ramesh More,
Aged about 33 years,
Occ: Household.

All r/o Malegaon Road, Taluka
Baramati, District: Pune.

1G. Rajaram Eknath Randive,
Aged about 39 years,
Occ: Agriculturist.

2. Nivruti Sopan Yadav,
Aged about 50 years,
Occ: Agriculturist.

Nos.1G and 2 r/o Baramati, District: Pune. .... Respondents

Shri A.V. Anturkar for the Petitioners.

Sarvasri Abhijit P. Kulkarni h/for A.A. Kumbhakoni for the Respondent Nos.1A to 1D, 1F and 1G.

None present for the Respondent No.2, though served.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: DECEMBER 05, 2005

ORAL JUDGMENT:

1. The petitioners challenge the order dated 19-3-1991 passed by the Additional District Judge, Baramati in Civil Miscellaneous Application No.16 of 1991. By the impugned order, the lower Appellate Court has rejected the application filed by the petitioners for setting aside the order of dismissal of the application for condonation of delay in filing the appeal by the petitioners.

2. The respondents herein filed Suit No.149 of 1979 for specific performance of an agreement which was decreed on 7-10-1985 against the petitioners. The petitioners preferred an appeal in the lower Appellate Court and as there was delay in filing the appeal, it was accompanied by a Miscellaneous Civil Application No.809 of 1986 being an application for condonation of delay. Originally the said application with the appeal was

lodged in the District Court at Pune but subsequently it was transferred to the lower Appellate Court at Baramati and registered as No.17/B/1989. The said application for condonation of delay bearing No.17/B/1989 was fixed for hearing on 29-1-1991. However, as the petitioners failed to appear before the Court, nor were represented by any Advocate, the said application came to be dismissed for default on the said day i.e. on 29-1-1991. The petitioners thereafter filed Miscellaneous Application No.16 of 1991 for restoration of the Miscellaneous Application No.17/B/1989. The same was filed on 11-3-1991. Upon hearing the said application, the lower Appellate Court by its order dated 13-7-1991 dismissed the said application holding that the same was filed beyond the period of limitation and also that it was not accompanied by any application for condonation of delay, nor the petitioners had shown any sufficient cause for the delay. Hence, the present petition.

3. The learned Advocate appearing for the petitioners, while challenging the impugned order, submitted that the lower Appellate Court erred in dismissing the application filed by the petitioners for restoration of the application for condonation of delay solely on the ground that the same was beyond the period of limitation, ignoring the fact that the application was under Section 151 of the Code of Civil Procedure, 1908,

hereinafter called as "the C.P.C." and not under any other provision of the C.P.C. and therefore the Court below could not have held that the provisions of Article 122 of the Limitation Act, 1963, hereinafter called as "the said Act" were applicable, but ought to have considered that the provisions of law of limitation which are attracted are comprised under Article 137 thereof. Drawing attention to Article 122 of the said Act, it was sought to be contended that it applies only in case of application for restoration of suit or appeal or an application for review or revision but it does not apply to the proceedings relating to the application for restoration of application for condonation of delay. In fact, according to the learned Advocate, there is no specific provision prescribing the period of limitation for any such application and therefore the residuary provision under Article 137 would apply to such proceedings. It was also further submitted that the Legislature in its wisdom has made a specific provision under Order 41, Rule 19 for a situation arising out of dismissal of the appeal under Rules 17 of Order 41 of the C.P.C. but has not made any similar provision in relation to application for condonation of delay filed along with the appeal filed beyond the period of limitation and therefore such an application is required to be considered as one under Section 151 and not under Order IX of the C.P.C.

4. The learned Advocate appearing for the respondents, on the other hand, has submitted that the application in question could not have been dealt with under Section 151 of the C.P.C. in view of specific provision under Section 141 r/w Order IX, Rule 9 of the C.P.C. being available to deal with such applications and the same is also attracted at the stage of the appellate proceedings. Being so, the provisions of Article 122 would obviously apply to the application for restoration of the application for condonation of delay having been read along with the provisions of law comprised under Section 141 of the C.P.C. r/w Order IX, Rule 9 thereof. According to the learned Advocate, therefore, no fault can be found with the impugned order.

5. It is not in dispute that the order dated 29-1-1991, which was passed by the lower Appellate Court, was in relation to the application for condonation of delay in filing the appeal. Undisputedly, therefore, the dismissal of the application was at the appellate stage and the provisions of Order 41 of the C.P.C. were, therefore, attracted.

6. In terms of Rule 3-A of Order 41 of the C.P.C., when there is a delay in filing an appeal, same has to be accompanied by an application supported by an affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not

preferring the appeal within the prescribed period of limitation. The sub-rule (2) of Rule 3-A provides that if the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal either under Rule 11 or Rule 13, as the case may be. Evidently, therefore, the order which was passed on 29-1-1991 was in exercise of powers under Order 41, Rule 3-A of the C.P.C.

7. The Rules 17 and 19 of Order 41, to which reference is made on behalf of the petitioners, deal with the procedure for dismissal of appeal for appellant's default and for re-admission of appeal dismissed for default, respectively. The sub-rule (1) of Rule 17 provides that where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal is dismissed, and the Rule 19 provides that where an appeal is dismissed under Rule 11, sub-rule (2) or Rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called out for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or

otherwise as it thinks fit. Undisputedly, these provisions deal with the matters relating to the appeal itself and not in relation to any miscellaneous application filed either in the appeal or the application for condonation for delay in filing the appeal.

8. The Order IX, Rule 8 of the C.P.C. provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. The Rule 9(1) thereof provides that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. Obviously therefore, when the suit is dismissed for default, the plaintiff may apply for setting aside of the dismissal

order provided he is able to satisfy the Court that there was sufficient cause for his non-appearance when the suit was called out for hearing.

9. The Section 141 of the C.P.C. provides that the procedure provided in the C.P.C. in regard to the suit shall be followed as far as it can be made applicable in all the proceedings in any Court of civil jurisdiction and its explanation clause provides that the expression "proceedings" includes proceedings under Order IX of the C.P.C. It was sought to be argued that the provisions of Section 141 would apply to any proceedings other than the proceedings under the C.P.C. and therefore it would not apply to the proceedings in appeal which arises under Order 41 of the C.P.C. and since there is no specific provision made as regards the restoration for the application for condonation of delay under Order 41 and resort to the provision under Order IX, Rule 9 cannot be had to and such an application will have to be dealt with under Section 151 of the C.P.C. and therefore the provisions of Section 141 would not apply to such proceedings.

10. The issue as to whether the provisions under Section 141 apply only to the proceedings other than those arising under the C.P.C. or not need not be dealt with in the case in hand. Suffice to observe that the explanation under Section 141 specifically provides that

in case of proceedings under Order IX, the provisions of Section 141 are applicable. Once it is apparent that the provisions of Section 141 are applicable to the proceedings under Order IX, it obviously would mean that it would apply to all miscellaneous proceedings arising in as well as pending in relation to the suit filed in the civil Court. Obviously therefore the provision of Section 141 would apply to the proceedings relating to an application for condonation of delay in filing the application for restoration of the suit filed under Order IX, Rule of the C.P.C.

11. It is to be noted that under Section 107(2) of the C.P.C., it is provided that subject to what is provided in the sub-rule (1) of Section 107, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the C.P.C. on the Courts of original jurisdiction in respect of suits instituted therein. In other words, the Appellate Court is expected to exercise all the powers of the Courts of original jurisdiction in relation to the proceedings at the appellate stage depending upon the facts and circumstances in each case.

12. Once it is apparent that the provision of Section 141 are attracted in case of proceedings for application for condonation of delay in filing the application for restoration of suit in exercise of powers under Order

IX, Rule 9 of the C.P.C., it would also apply to similar proceedings filed at the appellate stage in view of the provisions under Section 107(2) of the C.P.C.. Mere absence of specific provision in that regard in Order 41 will not be sufficient to enable the Court to invoke the powers under Section 151 of the C.P.C.. It is well-settled law that resort to powers under Section 151 cannot be had when there are specific provisions dealing for particular circumstances arising in civil proceedings, may be either before the Court of original jurisdiction or appellate jurisdiction.

13. Undoubtedly, Article 122 of the said Act specifically relates to a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution. However, as already seen above, the proceedings under Order IX, Rule 9 includes the proceedings at the appellate stage also in view of the provision under Section 107(2) of the C.P.C.. Now, Section 141 of the C.P.C. provides that the procedure applicable to suits also applies to the miscellaneous proceedings which include the proceedings under Order IX, Rule 9 of the C.P.C.. Therefore, it would also apply to the application for restoration of the miscellaneous proceedings including the one filed for restoration of the application for condonation of delay. Obviously therefore the Article 122 which applies to the applications under Order IX, Rule 9 would

also apply to proceedings in relation to the application for restoration of the application for condonation of delay, filed either in the suit as well as in the appeal. Evidently, the provision of Article 122 of the said Act would be attracted even in cases of an application for restoration of the application for condonation of delay filed at the appellate stage.

14. The Article 137 of the said Act deals with any other application for which no period of limitation is provided elsewhere in the said Act. The expression "any other application" would not include an application which is specifically or impliedly covered by any other Article under the said Act. As already seen above, the application for restoration of the application for condonation of delay filed under Order IX, Rule 9 of the C.P.C. either in the Court of original jurisdiction or in the Court of the appellate jurisdiction having been covered by the provision under Article 122 of the said Act, the provision of Article 137 thereof will not be attracted.

15. Besides, once it is clear that the Legislature in its wisdom has provided a period of 30 days for filing the application for condonation of delay in filing appeal, it would lead to absurd result to interpret Article 122 to exclude the application for restoration from condonation of delay from its ambit and to presume

that it would enjoy the period of 3 years under Article 137.

16. Evidently, therefore even in case of application for restoration of the application for condonation of delay, the provisions of Article 122 of the said Act would be attracted and on that count the lower Appellate Court having exercised its discretion in dismissing the application by the impugned order, there is no scope for contending that the Court has failed to exercise its power or has improperly exercised its power while dealing with the application which was filed by the petitioners much beyond the period of limitation prescribed under the said Article. The Court below has clearly arrived at the finding that the provisions of Article 122 of the Limitation Act are attracted in the matter and yet the petitioners failed to file even an application for condonation of delay, though the application for restoration of the application for condonation of delay was filed beyond the period of 30 days and the petitioners had failed to show any sufficient cause for such delay, the application was liable to be dismissed and accordingly has been dismissed.

17. There is no case for interference in the writ jurisdiction in the impugned order and therefore the petition fails and is hereby dismissed. The rule is

discharged with no order as to costs.